No. 80-1413

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARION COUNTY SCHOOL DISTRICT, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Attorney General has authority to sue upon referral from the Secretary of Health, Education, and Welfare to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, by seeking specific performance of a school district's contractual assurances of nondiscrimination.

2. Whether the Marion County School District was bound by assurances of compliance with the nondiscrimination requirement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, executed by the school district as a condition for its receipt of federal financial assistance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 625 F.2d 607. The opinion and order of the district court (Pet. App. 25a-60a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1980 (Pet. App. 61a-62a). The court of appeals denied a petition for rehearing on October 23, 1980 (Pet. App. 63a-64a). On January 9, 1981, Justice Powell extended the time for petition-

ing for a writ of certiorari to February 20, 1981 (Pet. App. 65a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. It is undisputed that until 1965 the Marion County School District ("school district") operated a *de jure* racially segregated school system (Pet. App. 25a). The facts alleged in the government's complaint show that two elementary schools, formerly all black under the dual system—Madison Street Primary and Howard Upper Elementary—continue to have black enrollments in excess of 96% despite the school district's implementation of various desegregation plans (*id.* at 89a-90a). The attendance zone for these two schools encompasses a black neighborhood in Ocala, Florida, and in 1977-1978 the enrollment at Madison was 98.8% black and at Howard it was 97.2% black (*id.* at 90a). The complaint alleged that, through its student assignment policies, the school district has perpetuated these vestiges of its former dual system (*ibid.*).

From 1966 on, the school district, in exchange for a substantial amount of federal financial aid, has furnished assurances to the Department of Health, Education, and Welfare ("HEW")[1] that it will comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d.[2] Title VI prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assist-

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[1] Since May 1980 assurances of compliance have been filed with the Office of Civil Rights of the Department of Education.

[2] The relevant portions of Title VI are reproduced at Pet. App. 69a-70a.

ance.[3] In 1971 HEW began a review of the school district's desegregation efforts in light of this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and the continued operation of Madison and Howard as racially identifiable schools (R. 23, 83-84).[4] When efforts to obtain voluntary compliance with the school district's nondiscrimination assurance failed, HEW on April 17, 1973, notified the school district of its intent to begin proceedings to terminate federal financial assistance (R. 23, 84). An administrative law judge conducted a hearing and concluded that the school district was unitary and in compliance with Title VI (R. 23, 84-85). However, HEW's Reviewing Authority unanimously reversed the administrative law judge's decision on July 25, 1975 (R. 23, 85), concluding that the Madison and Howard schools were vestiges of the school district's former dual system in violation of the Fourteenth Amendment and Title VI (Pet. App. 83a-84a). The Secretary of HEW

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[3] The assurance also obligates an applicant for federal funds to comply with all regulations issued pursuant to Title VI (Pet. App. 23a). See 45 C.F.R. Parts 80, 81. The duration of the applicant's obligation depends on the nature of the financial assistance received. If real property is provided, the applicant is obligated for the period during which the property is used for the purpose for which the federal aid was extended (Pet. App. 23a). If personal property is provided, the applicant is obligated so long as it retains ownership or possession of the property (*ibid.*). In all other cases, the applicant is obligated for the period during which the financial aid is extended (*ibid.*).

The school district furnished HEW with assurances of compliance in 1966 and 1970; a copy of the 1970 assurance was attached to the complaint in this case (Pet. App. 2a n.1).

[4] "R." refers to the record in the district court.

denied the school district's petition for review of the Reviewing Authority's decision and fund termination proceedings were commenced (Pet. App. 84a).

In July 1977 HEW's administrative fund termination proceedings were suspended by stipulation (R. 23-24, 85). HEW subsequently concluded that the Madison and Howard schools could not be desegregated without transporting some students to a school other than that nearest their home (Pet. App. 84a). HEW could not seek such relief itself because of the specific prohibition of the Eagleton-Biden Amendment (Section 209 of the Department of Labor and Health, Education, and Welfare Appropriations Act, 1978, Pub. L. No. 95-480, 92 Stat. 1586) against HEW's use of federal funds to require transportation of any student to a school other than the school nearest the student's home (Pet. App. 84a-85a).[5] Since efforts to obtain the school district's voluntary compliance had failed (*id.* at 85a), HEW's only recourse in seeking to fulfill its obligations under Title VI and the Fifth Amendment was to refer the matter to the Attorney General for initiation of suit as provided in 45 C.F.R. 80.8(a) (Pet. App. 85a-86a).[6]

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[5] The full text of the Eagleton-Biden Amendment is reproduced at Pet. App. 76a-77a.

[6] 45 C.F.R. 80.8(a) provides in pertinent part (emphasis supplied):

> If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. *Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United*

2. On May 23, 1978, the United States filed a complaint against the school district in the United States District Court for the Middle District of Florida, seeking to enforce Title VI by specific performance of the school district's assurance of compliance with Title VI and its implementing regulations (Pet. App. 87a-92a). The complaint alleged that the school district breached its nondiscrimination assurance by assigning students in a manner that maintained racially identifiable schools, thereby perpetuating its former dual system in violation of the Fourteenth Amendment and Title VI (*ibid.*).

The district court dismissed the complaint without prejudice on the ground that the United States has no authority to secure compliance with Title VI by an action to enforce the school district's contractual assurances of nondiscrimination made as consideration for federal financial assistance (Pet. App. 29a-30a). While agreeing that the "prima facie evidence of vestigial, dual education systems" (*id.* at 58a) shifted to the school district the "heavy" burden of proof (*id.* at 26a) that the two formerly segregated schools were not lingering vestiges of the *de jure* segregated system, the court concluded that it lacked jurisdiction to reach the merits of the case (*id.* at 30a, 59a). The court reasoned that 28 U.S.C. 1345, the provision under which the government filed suit, confers jurisdiction only for actions expressly authorized by statute (Pet. App. 29a).

The district court also stated that Congress intended to forbid the United States to exercise its common law contract right to enforce contractual

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States under any law of the United States (including other titles of this Act), or any assurance or other contractual undertaking * * *.

assurances of compliance executed by recipients of federal financial assistance (Pet. App. 37a-38a). While the court acknowledged that the United States has a well-established common law right to sue for specific enforcement of contracts to which it is a party (*id.* at 50a-51a), it concluded that this right was not included in Title VI's authorization to seek compliance by fund termination or "by any other means authorized by law" (*id.* at 56a). Rather, the court believed that enforcement of Title VI is strictly limited to (1) fund termination procedures; (2) informal administrative efforts to achieve voluntary compliance; (3) suits by the Attorney General under Title IV of the Civil Rights Act, 42 U.S.C. 2000c-6; and (4) intervention by the Attorney General in private suits pursuant to Title IX of the Civil Rights Act, 42 U.S.C. 2000h-2 (Pet. App. 56a). Accordingly, the court invalidated HEW's regulations authorizing the Secretary to refer matters to the Attorney General for suits to enforce assurances of compliance with Title VI (Pet. App. 58a) and dismissed the government's complaint (*id.* at 59a).

3. On September 10, 1980, the court of appeals unanimously reversed the district court, upholding the authority of the Attorney General to bring, and the jurisdiction of the federal courts to resolve, suits to enforce contractual assurances of compliance with Title VI by recipients of federal funds (Pet. App. 21a-22a).

The starting point for the court of appeals' analysis was the well-settled right of the government to fix the terms and conditions upon which it disburses federal funds and to sue for enforcement of those conditions (Pet. App. 3a-5a). Noting that this right exists as a matter of common law, the court of appeals concluded that the district court erred in determining

that Congress has deliberately nullified the right when the United States seeks to enforce assurances of nondiscrimination in the operation of public schools (Pet. App. 6a-7a).

The court of appeals found no basis in the legislative history of the Civil Rights Act of 1964 for the inference that Congress intended the statute's enumerated means of eliminating discrimination in public schools to be the *exclusive* means of accomplishing that goal (Pet. App. 8a-10a). On the contrary, the court of appeals observed that the explicit language of the Act—in particular Section 602 of Title VI (42 U.S.C. 2000d-1)—and the Act's legislative history manifest congressional approval of suits by the United States to enforce Title VI by seeking specific performance of contractual assurances of nondiscrimination (Pet. App. 10a & n.12). In addition, the court found support for this authority in HEW's implementing regulations interpreting the Act to authorize such litigation (*id.* at 10a-12a & n.13). The court of appeals noted that no other court has held that the Civil Rights Act prohibits such suits to enforce Title VI, and a number of courts have recognized that such suits are proper (*id.* at 12a-13a n.14).

Turning to the school district's contention that the Eagleton-Biden Amendment prohibits the Attorney General from suing to enforce Title VI assurances when specific performance would require transportation of students beyond their neighborhood schools, the court of appeals found that nothing in the language of the amendment or its legislative history supports that argument (Pet. App. 14a). The court pointed out that, in enacting the amendment, Congress intended only to prevent HEW from using its own administrative proceedings to require school dis-

tricts to adopt busing plans (*id.* at 15a). The Amendment thus leaves the courts free to mandate student reassignments involving transportation when necessary in desegregation suits such as this in which the Attorney General, on referral from HEW, seeks to enforce a school district's obligation under Title VI (*id.* at 15a-16a). The court noted that the contrary interpretation urged by the school district would raise questions as to the constitutionality of the Eagleton-Biden Amendment itself since, by depriving the United States of any means to challenge discriminatory practices remediable only through student transportation and by requiring HEW to continue to fund school districts engaged in discrimination, the Amendment would compel the United States to violate the Constitution (*id.* at 17a-19a).

Concluding that "the United States is entitled to sue to enforce contractual assurances of compliance with Title VI's prohibition against discrimination in the operation of federally-funded schools, and that the United States is entitled to whatever relief is necessary to enforce such assurances, including 'transportation relief,' " the court of appeals reversed the district court's dismissal of the complaint and remanded the case for further proceedings (Pet. App. 21a-22a).

ARGUMENT

The decision of the court of appeals, upholding the well-settled right of the United States to sue to obtain compliance with Title VI by recipients of federal funds, is correct. Despite their characterization of that decision as "unprecedented" and "unjustifi[ed]" (Pet. 11), petitioners raise no question warranting review by this Court. Nor do petitioners cite any case that adopts their position, other than the decision of the district court.

The court of appeals correctly found that the Civil Rights Act of 1964 not only does not prohibit, but in fact expressly authorizes, litigation by the United States to enforce the nondiscrimination requirement imposed by Title VI. While subsequent legislation has limited the power of HEW to require transportation of students as a desegregation remedy in *administrative* proceedings, Congress has not forbidden the Attorney General from seeking court-ordered transportation to eliminate unlawful segregation by a school district receiving federal funds.

Petitioners also assert that the court of appeals misinterpreted the school district's contractual assurance as requiring the district to meet currently enforceable desegregation standards "even if the District were never to receive another cent of federal aid" (Pet. 22). In view of petitioners' continued receipt of federal financial assistance, that claim is purely hypothetical. Moreover, to the extent that this argument rests on petitioners' allegation—raised for the first time in this Court—that they were bound only by the 1966 assurance and not by the assurance executed by the school board chairman on October 14, 1970 (Pet. 23), that argument presents a factual issue not before the district court on the motion to dismiss the complaint, and thus not appropriate for resolution by this Court. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

1. *a.* Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, prohibits discrimination on the basis of race, color or national origin with respect to any program or activity receiving federal financial assistance. Federal agencies administering federally funded programs are required by Title VI to adopt

substantive regulations and they may secure compliance with such regulations (42 U.S.C. 2000d-1):

> (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement * * * or (2) by any other means authorized by law * * *.

As the court of appeals recognized, resolution of the question in this case turns on whether Title VI's mandate to secure compliance "by any other means authorized by law" includes litigation such as the present suit instituted by the Attorney General. The court of appeals' affirmative answer to that question is solidly grounded on (1) well established principles of statutory construction; (2) the legislative history of Title VI; (3) the contemporaneous construction of that statute by HEW, an administrative agency charged with implementing it; and (4) settled case law.[7]

Given the well established common law right of the United States to attach conditions to grants of fed-

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[7] Petitioners describe the court of appeals' decision as "unprecedented" (Pet. 11) and assert that the legal theory supporting it is "novel" (*id.* at 24 n.14). But, as the court of appeals noted (Pet. App. 12a n.14), apparently the only court to adopt petitioners' view of Title VI is the district court in this case. Several other courts have recognized that suits such as this by the Attorney General seeking specific performance of contractual nondiscrimination assurances are proper. See, *e.g.*, *United States* v. *Tatum Independent School District*, 306 F. Supp. 285, 288 (E.D. Tex. 1969); *United States* v. *Frazer*, 297 F. Supp. 319, 322-324 (M.D. Ala. 1968); *Brown* v. *Califano*, 627 F.2d 1221, 1232 n.67 (D.C. Cir. 1980).

eral assistance and to sue for enforcement of those conditions (Pet. App. 3a-7a), the court of appeals concluded that, in light of this Court's decisions, a legislative limitation on that right should not be implied in the absence of clear and specific language to that effect (Pet. App. 7a-8a & n.6). As this Court stated in *United States* v. *Stevenson*, 215 U.S. 190, 197 (1909),

> [t]he rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect.

In this case, petitioners can point to "no persuasive, much less unmistakable, evidence that Congress intended to eradicate or even restrict the United States' right to sue to enforce contractual assurances of nondiscrimination in the operation of public schools" (Pet App. 8a). Accordingly, their contention that Congress has prohibited the Attorney General from bringing suits of the type involved here is without merit.

b. The legislative history of Title VI unequivocally demonstrates Congress' understanding that the phrase "any other means authorized by law" includes suits by the United States to enforce assurances of the type at issue here. When asked on the floor of the Senate about the meaning of that phrase, Senator Pastore, a sponsor of the Act, replied: "Again, if any agency's nondiscrimination requirement is embodied in a contractual commitment, the agency may be able to bring suit to enforce its contract." 110 Cong. Rec. 7060 (1964). Senator Ribicoff, another sponsor, described such a suit as "the most effective way for an agency to proceed." *Id.* at 7066. Urging this

Court to overlook these statements, petitioners argue that, because the Civil Rights Act enumerates specific kinds of desegregation litigation to be brought by the United States (suits under Title IV and intervention in private suits under Title IX), those are the exclusive means by which the Attorney General can challenge discrimination in the operation of public schools (Pet. 12-18). The court of appeals correctly rejected that contention (Pet. App. 9a-12a).

As the court of appeals recognized (Pet. App. 10a), the Civil Rights Act nowhere states that suits under Title IV and intervention under Title IX are to be the exclusive means for eliminating discrimination in the operation of public schools. Section 602 of Title VI permits enforcement by "any other means authorized by law"—not "any other means authorized by this statute." Moreover, Title XI of the Act, 42 U.S.C. 2000h-3, expressly provides that:

> Nothing in this Act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or officer thereof under existing law to institute or intervene in any action or proceeding.

Petitioners' contention that the other provisions of the Civil Rights Act were intended to limit the right of the United States to condition grants of money on agreements not to discriminate and its right to sue to enforce those conditions cannot be reconciled with the explicit terms of Title XI.

In addition, the legislative history of Title VI demonstrates that fund termination was not favored as a means of enforcing Title VI's nondiscrimination requirement. To assure that an agency would not lightly cut off funds, the House committee proposal was amended to include a number of procedural safe-

guards in the fund termination process. See, *e.g.*, the discussion of amendments requiring thirty days' notice to the congressional oversight committee (110 Cong. Rec. 2498-2499 (1964)); requiring presidential approval of agency regulations under Title VI (110 Cong. Rec. 2500 (1964)); and requiring administrative hearings prior to fund termination (110 Cong. Rec. 2506 (1964)).

The Act's Senate sponsors repeatedly emphasized in the debates that administrative fund termination would be used "[o]nly as a last resort" (110 Cong. Rec. 7060 (1964) (Senator Pastore)), and that suits to end discrimination were preferable to fund termination that would injure innocent beneficiaries of federally funded programs (110 Cong. Rec. 7065 (1964) (Senator Ribicoff)). Petitioners' contention that Congress intended to restrict suits to secure compliance with Title VI, and intended to rely chiefly on devices such as fund termination, cannot be squared with this legislative history.

c. HEW's regulations implementing Title VI, issued shortly after its passage, provide additional support for the authority of the Attorney General to bring this suit. In 45 C.F.R. 80.8(a) HEW explicitly provided that, in the event of a federal fund recipient's noncompliance with Title VI, the agency can refer the matter to the Department of Justice for appropriate proceedings "to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking * * *." The court of appeals recognized that, as a contemporaneous construction of Title VI by an agency charged with its execution, this interpretation by HEW of its authority and the authority of the Department of Justice under Title VI is strong evidence of legislative intent

(Pet. App. 11a-12a n.13). See also 28 C.F.R. 50.3 (Department of Justice guidelines for the enforcement of Title VI, promulgated in 1966).[8]

d. Petitioners rely on the Eagleton-Biden Amendment and its predecessor limitations on the authority of HEW to require transportation of students as a desegregation remedy[9] as evidence of a "congres-

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[8] Petitioners also claim that the more "specific" provisions of the Equal Educational Opportunities Act of 1974 ("EEOA"), 20 U.S.C. 1701 *et seq.* (which includes a prohibition against seeking student transportation as a desegregation remedy), override the "general" directives of Title VI (Pet. 14, 18-19). But there is nothing in the language or the legislative history of the EEOA to suggest that Congress intended it to be the "exclusive" means by which the United States could seek judicial redress in school desegregation cases. As the Sixth Circuit recognized in *United States* v. *School District of Ferndale*, 577 F.2d 1339, 1345-1346 (1978)—a case on which petitioners erroneously rely—the EEOA provides an additional statutory basis for the United States to initiate school desegregation suits along with equal protection claims raised in suits under Title IV of the Civil Rights Act. The EEOA is no more a limitation on the Attorney General's power to seek specific performance of a school district's nondiscrimination obligation under Title VI than it is a limitation on the Attorney General's power to seek transportation relief in a desegregation suit under Title IV.

Moreover, the EEOA and Title VI apply to two different subjects, the former applying solely to school desegregation, and the latter applying to any kind of program—educational or otherwise—receiving federal funds. Nothing in the language of either statute suggests that it is appropriate to limit the Attorney General's power to seek judicial enforcement of nondiscrimination assurances by school systems while leaving that power undisturbed as to nondiscrimination assurances by other recipients of federal funds.

[9] The Eagleton-Biden Amendment was preceded by the Esch Amendment, Pub. L. No. 93-380, Section 215(a), 88 Stat. 517, codified at 20 U.S.C. 1714(a), and several versions

sional policy" against busing. Petitioners further contend that this policy would be circumvented if the Attorney General is permitted to seek transportation relief in suits for specific performance of Title VI assurances (Pet. 11-15). In making that claim, petitioners use the phrase "Executive Branch" as though HEW and the Department of Justice were a single entity. But an amendment to the HEW appropriation bill plainly does not apply to the Department of Justice, and the legislative history makes clear that Congress intended to preserve the Attorney General's litigating authority in the area of Title VI enforcement.

The legislative history of the Eagleton-Biden Amendment clearly established "that Congress intended to prevent the HEW bureaucracy from acting solely on its own authority in *administrative* proceedings to coerce local school districts into adopting busing plans" (Pet. App. 14a-15a; emphasis in original). Congress' intent to permit the Attorney General to continue to seek transportation as a remedy in litigation brought under Title VI is apparent from the words of Senator Eagleton himself, who emphasized in the course of the floor debate that (123 Cong. Rec. 21246 (1977)):

> when HEW determines that compliance with title VI requires that students be bused, because of the grave consequences to a community that very often accompany such a requirement enforcement may not proceed through the administrative process. HEW is authorized under title VI to refer matters to the Department of Justice for litigation; this is the course that should

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of the Byrd Amendment, Pub. L. No. 94-206, Section 209, 90 Stat. 22; Pub. L. No. 94-439, Section 208, 90 Stat. 1434; and Pub. L. No. 95-205, Sections 101, 106, 91 Stat. 1460-1461.

> be pursued if there is a decision to go forward in a case to which the [Eagleton-Biden] amendment applies.

Thus, Congress deliberately left undisturbed the power of the Attorney General to sue for whatever remedy is necessary to end discrimination in a school system receiving federal funds. The court of appeals' decision on that issue is correct and does not warrant review by this Court.[10]

2. Petitioners also challenge the court of appeals' interpretation of their assurance of compliance.[11] They contend (Pet. 22) that the court's interpretation will subject the school district "to desegregation obligations in perpetuity" instead of "an exchange of one year's federal funds for one year's compliance with federal desegregation guidelines." [12] That conten-

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[10] The court of appeals recognized, as did the District of Columbia Circuit in *Brown* v. *Califano, supra,* that in choosing not to narrow the Attorney General's enforcement power in school desegregation suits brought under Title VI, Congress may well have "saved" the constitutionality of the Eagleton-Biden amendment (Pet. App. 17a-19a). Petitioners neither cite *Brown* v. *Califano* nor address the serious constitutional problems created by their theory which, if applied in a case such as this, would leave HEW with no alternative but to continue federal financial assistance to an unconstitutionally segregated school system. That assistance itself would arguably violate the Constitution. See *Norwood* v. *Harrison,* 413 U.S. 455, 463-468 (1973); *Cooper* v. *Aaron,* 358 U.S. 1, 19 (1958).

[11] As previously noted, petitioners argue for the first time in this Court that they were legally bound by the 1966 assurance but not by the 1970 assurance. It is, of course, inappropriate to attempt to litigate in a petition for certiorari a factual question never raised in the district court or the court of appeals.

[12] But see note 3, *supra.*

tion is conspicuously devoid of any reference to the record. Petitioners do not identify where in its opinion the court of appeals rendered this "erroneous interpretation." The only issue before the court of appeals and the only issue presented for this Court's consideration by the petition for certiorari is whether the district court erred in dismissing the government's complaint on jurisdictional grounds. Accordingly, this case presents no occasion for reviewing petitioners' arguments on the merits of the case or the form of relief that may be appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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